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Covenant Care of Ohio, Inc. d/b/a Wright Nursing and Rehabilitation Center and International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 34. Case 9-CA-41696

March 31, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on January 27, 2005, the General Counsel issued the complaint on February 11, 2005, alleging that the Respondent has violated Section 8(a)(1) and (5) of the Act by refusing the Union's request to bargain following the Union's certification in Case 9-RC-17918. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint, and asserting an affirmative defense.

On March 4, 2005, the General Counsel filed a Motion for Summary Judgment and memorandum in support. On March 9, 2005, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contends that the Union's certification is invalid because the Board erred in overruling its objections to the election in the representation proceeding. The Respondent also raises as an affirmative defense that "the Union was improperly certified" and therefore the Respondent "is under no legal duty to recognize or bargain with the Union."

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any

representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).¹ Accordingly, we grant the Motion for Summary Judgment.²

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation, has been engaged in the operation of a nursing home at its 829 Yellow Springs, Fairfield Road, Fairborn, Ohio facility.

During the 12-month period preceding issuance of the complaint, the Respondent, in conducting its operations described above, had a gross volume of business in excess of \$250,000, and purchased and received at its Fairborn, Ohio facility, goods valued in excess of \$2000 directly from points outside the State of Ohio.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 34 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the election held on July 20, 2004, the Union was certified on November 17, 2004, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time certified nurse assistant/state tested nurse assistant, housekeeping, dietary, laundry, restorative, activity, and maintenance employees employed by the Employer at its 829 Yellow Springs, Fairfield Road, Fairborn, Ohio facility, but excluding all registered nurses, licensed practical nurses, select therapy employees, all office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

¹ Chairman Battista did not participate in the underlying representation proceeding. He agrees, however, that the Respondent has not raised any new matters or special circumstances warranting a hearing in this proceeding or reconsideration of the decision in the representation proceeding, and that therefore summary judgment is appropriate.

² The Respondent's requests that the complaint be dismissed, that the Union's certification be revoked, and that the Respondent be awarded costs and attorneys' fees are therefore denied.

B. Refusal to Bargain

On about November 23, 2004, the Union, in writing, requested that the Respondent recognize and bargain collectively with it as the exclusive collective-bargaining representative of the unit. Since about November 23, 2004, the Respondent has failed and refused to recognize and bargain with the Union. We find that this failure and refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(1) and (5) of the Act.

CONCLUSION OF LAW

By failing and refusing since November 23, 2004, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(1) and (5) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Covenant Care of Ohio, Inc. d/b/a Wright Nursing and Rehabilitation Center, Fairborn, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 34, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if

an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time certified nurse assistant/state tested nurse assistant, housekeeping, dietary, laundry, restorative, activity, and maintenance employees employed by the Employer at its 829 Yellow Springs, Fairfield Road, Fairborn, Ohio facility, but excluding all registered nurses, licensed practical nurses, select therapy employees, all office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Fairborn, Ohio, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 23, 2004.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 31, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with International Association of Machinists and Aerospace Workers, AFL-CIO, District

Lodge 34, as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time certified nurse assistant/state tested nurse assistant, housekeeping, dietary, laundry, restorative, activity, and maintenance employees employed by us at our 829 Yellow Springs, Fairfield Road, Fairborn, Ohio facility, but excluding all registered nurses, licensed practical nurses, select therapy employees, all office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

COVENANT CARE OF OHIO, INC. D/B/A WRIGHT
NURSING AND REHABILITATION CENTER